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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MALIBU MEDIA, LLC.	*	
Plaintiff,	*	
v.	*	Case No. 3:15-cv-06652-MLC-TJB
JEFFREY CLABURN,	*	
Defendant	*	

* * * * * * * * * * * * *

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

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Embarrassing Table of Cases

In re Hulu Privacy Litigation, No. C 11–03764 LB, 2012 WL 3282960, slip op. (N.D. Cal.)

Yershov v. Gannett Satellite Information Network, Inc., No. 15-1719 (1st Cir. Apr. 29, 2016)

Statement of the Case

Malibu Media is a video tape service provider within the meaning of the Video Privacy Protection Act ("Video Privacy Act" or "Act"), which makes it subject to a special set of restrictive disclosure rules under the Act intended to maintain the privacy of consumer video personally identifiable information (hereinafter "Private Video Information"), and its Complaint rests entirely on claims that constitute Private Video Information with respect to the Defendant

It is essential to establish from the outset that language of the statute is very precise, and this case and this memorandum only involve sections (b)(2) and (d) of the Act; it does not in any way involve sections (b)(1) and (c) of the Act, which have been the focus of most recent cases applying the Act. Sections (b)(1) and (c) establish legal liability for, and create a defined cause of action against, video service providers who release Private Video Information in any manner other than pursuant to an enumerated disclosure exception. However, these liability provisions are limited to (1) "knowing" disclosures of Private Video Information (2) "concerning any consumer of such provider"--in short, its own customers.

Sections (b)(2) and (d), however, use different language, and are also different from each other. In the absence of a disclosure rule, section (b)(2) prohibits video service providers from disclosing Private Video Information "concerning any consumer" full stop. There is no limitation to a service provider's own customers. It is directly applicable to this case.

Finally, section (d) is completely different from each of the others. It is the least restrictive of all. There is no mention of or limitation to video service providers. Section (d) is a rule applicable to the judiciary, which as the Senate Committee Report explains, preempts all other conflicting discovery and evidence rules. It establishes a blanket prohibition on the admission Private Video Information--of any kind, by any method, from any source, for any reason--unless the litigant, governmental or private, submits evidence it obtained directly under one of the statutory disclosure routes set forth in the Act. It is also directly applicable to this case.

No doubt Plaintiff will accuse Defendant of parsing hairs and overreading minor unintended discrepancies in language. However, the place to begin in interpreting any statute is the plain language of the statue. But perhaps just as importantly, the alternative word choices and meaning attributed by Defendant align perfectly with the multiple policy goals and relative policy priorities discussed at length in the Congressional Record. Finally, they just make logical and good policy sense. It seems impossible to make sense of why the statute is drafted and manner in the indirect and circuitous manner that it is, and how the plain of the language connects with the Congressional Record and the statements of its authors, without delineating the distinctions Defendant sets forth. Defendant will attempt to make these links.

General Factual Background

Plaintiff Malibu Media runs a prescription website known as X-Art which, for a monthly fee, gives subscribers access to view and download original thematic non-satirical movies it produces of an highly adult nature, such as *Many Shades of Grey*, one of the works whose copyright it accuses Defendant of violating.

Malibu Media takes it's *own* copyright and intellectual property claims very seriously. It is purportedly responsible for more than the half the copyright cases filed annually in the country. This is a much greater volume of litigation than, for example, HBO engages in with respect to episodes of Game of Thrones--which is widely reported to be the most widely downloaded property on the internet--or the producers of major motion pictures, such as *50 Shades of Grey*, for which it was reported that there were 300,000 copies illegally downloaded within three days of its theatrical release![1] and which in particular, as a cultural phenomenon, seems to have spawned several copyright-infringing copy-cat works by the adult-films industry, see, e.g., Debate.org, "Is 50 Shades of Grey Porn?" (reporting "86% say yes, 14% say no").[2]

Facts Assumed

This memorandum necessarily accepts as true all of Plaintiff's factual allegations, since it supports a motion to dismiss under section 12(b)(6).

However, it need not accept as true, merely conclusory allegations made by the Plaintiff, such as its claims that "Defendant downloaded, copied, and distributed a complete copy of Plaintiff's movies," Complaint at 19, or that "Defendant is a habitual and persistent BitTorrent User and copyright infringer," Complaint at 24.

Observations of Technological Fact Regarding the BitTorrent Network -- Not Factual Claims

Plaintiff must not plead additional facts in order to support a 12(b)(6) motion. This presents something of a conundrum, because the facts plead by Plaintiff in its Complaint are so sparse and incomplete. They purport to describe the BitTorrent network. Defendant accepts as true Plaintiff's factual claims regarding the network. But they just don't paint a full picture, to put the problem in a nutshell. Accepting all Plaintiff's claims in the Complaint as true, here is the bigger picture:

Individuals do not use a file distribution network in a literal, they use a "bitTorrent client" service; similar to how individuals do not in a literal sense use email, they use a specific email

[1]http://perezhilton.com/2015-02-18-50-shades-of-grey-pirated-copies-illegal-download-video-lolo-jones-twitter/?from=post
[2] http://www.debate.org/opinions/is-fifty-shades-of-grey-porn

provider, such as gmail, and they do not literally browse the internet, they use an internet browser such as Chrome.

Plaintiff could not have "established a direct TCP/Ip connection with Defendant's IP address," Complaint 18, and then "downloaded from Defendant" over the BitTorrent network, Complaint 19, without a "Bittorrent client" being installed and at that moment running at Defendant's internet address. Use of the BitTorrent client on either end is not possible without a Bittorrent client, unless Plaintiff hacked into Defendant's computer.

Plaintiff's description of the the BitTorrent, while true, is written as though by a programmer describing his program. A corporation such as IPP International UG can build it's own highly customized Bittorrent client to its specification; however, individuals have to use a commercial service, which more often than not is the specific client service "utorrent," owned by the creator of the Bittorrent network.

Millions of Americans install utorrent (owned and operated by BitTorrent Inc;.) on their computer (or a highly similar competitor), like they do the client programs for iTunes or Netflix. And like those clients, or Youtube or Hulu, they use it to download and stream. Each is a little different, but to the user they are all just streaming and downloading platforms, with its kinks. Under case law, Hulu and Netflix, Youtube and iTunes, are video service providers for the purposes of the Video Protection Act. BitTorrent is a video provider like they are, however it (for the most part but not exclusively) provides data by transferring it from some place other than company-owned storage. The user experiences the same thing--streaming videos or downloading videos--which should the most important matter for purposes of the Video Privacy Protection Act.

However, internally, the fundamental architecture of utorrent and the other bittorrent clients used by individuals is such that, *beyond the direct control of the individual user*, pieces of a given file are frequently, but not always, being uploaded by a user's computer at the same time other pieces are being downloaded, whenever a user choses to stream or begin downloading a video. Therefore when Plaintiff asserts at Complaint 18, which Defendant accepts as fact, that it established a connection and uploaded at least one bit from Defendant, this is equivalent to saying that Defendant was running utorrent in order to obtain specific video materials or services from company Bittorrent

An example will make all of this so much more clear. One pays BitTorrent Inc. a $20 annual fee for the use of utorrent, which is continually maintained and updated by BitTorrent Inc., in order to live stream and watch or download and save videos over the utorrent platform. BitTorrent Inc. also provides much premium content and an exclusive catalog for users, as well as the ability to stream and upload any torrents in the Bittorrent file exchange format, created by the founder and CEO of BitTorrent Inc. One can also purchase a less-expensive ad-free version with fewer features. Finally, one can download and use the "free version" of utorrent which contains advertising, like YouTube and the free version of Hulu. For example, when one starts to stream a video torrent or download a video, a car commercial will play. The "free version" also installs certain programs by default that Bittorrent is paid to install, though users can opt out.

Thus, taking all Plaintiff's claims as true, they show that Plaintiff's investigator was able to connect to utorrent or another Bittorrent client over which individuals stream and download videos. Although not necessary to this analysis, in point of fact Defendant wagers--and is willing to wager opposing counsel in fact--that Plaintiff's investigator uses proprietary software or technology, in general on a 24-hour, 7 day-a-week basis, looking for any potential connection meeting its criteria in the United States (or at least in areas where Plaintiff is plotting a litigation strategy), essentially subjecting millions of individuals in the United States to perpetual eavesdropping, and that this software locks on when it first detects a connection or relatively quickly thereafter--meaning, in practical terms, it is not really monitoring or capturing uploading at all, or even the completion of a download; rather it is usually locking in when anyone, anywhere first starts to live stream a video torrent to see what it contains, or first starts to download a video (whether or not the download ever completed, saved, or viewed), and simply exploits the technology underlying utorrent and or any other Bittorrent client used by individuals to download as the complaint states, "one or more bit" of the Plaintiff's movie. Again, this is offered not as a set of facts that is essential to the memorandum, but just to give the Court, and anyone else reading this memorandum, some realistic sense of what is actually happening--which can't possibly come from reading Plaintiff's Complaint. (In the alternative to the relief sought in this memo, dismissal, Plaintiff moves for a *much* more definitive, or should one say honest, statement.)

Legal Discussion

(It will be the case, Defendant apologizes in advance, that the brief is *very light* on case analysis and that the quality of citations to the Congressional record is poor. If the opportunity for a reply to Plaintiff's response is provided, Defendant will address and correct this problem. Defendant will also prepare a supplemental and/or amended brief, without altering the legal arguments, with more extensive case analysis and better citations. Partly what happened is that the brief has gone through more than ten drafts and more refined sections have often been cut and replaced with unpolished ones. But a large part of the issue is that the cases Defendant found and discussed in earlier drafts all focused on somewhat different issues in a somewhat different context from a somewhat different perspective. Defendant proffers that he has not yet found a case that parses the precise plain language of the statute to the level of depth and specificity he has, comparing section and subsection to section and subsection. He has also not found a cases that goes into the Legislative history and Congressional policy analysis to the extent he has delved. But he may just be deluding himself. Perhaps a little levity may compensate for wrongful brevity.)

The Privacy Protection Act of 1988, as amended, is set forth below in its entirety for benefit of the reader, because Defendant offers a close and perhaps novel reading, for frequent referral.

Some interesting observations: On its face, at first blush, the whole Act seems to revolve around the liability rule set forth in section (a)(1). It is of course one of the most important provisions in the Act. Yet the Congressional discussion describes the damages provisions as "necessary teeth" for the statute that really aren't the point of the statute at all. To paraphrase what one Congressmen said and others reiterated, we aren't trying to punish the video rental industry at all, we are trying to establish a new right to privacy for individuals and protect that right.

One of the strangest aspects of the Acts is that it never explicitly states, "a video tape service provider shall not disclose personally identifiable information concerning any consumer, except as provided herein," or the equivalent. Everything is expressed, if you will, backwards, through restrictions, exceptions, and damages. Nevertheless, the entire thrust of the Act, as well as the Legislative History, all make clear that the Act is intended to be highly prescriptive, and obligatory, as well as technical. It's not at all intended to be a "cross the line, pay the fine" sort of regulation. In essence, (b)(2) has to be read implicitly to mean, "a video tape service provider may [not] disclose personally identifiable information concerning any consumer [unless]" (parentheticals added). Although implicit rather than explicit, it's the only line in the Act that seems to set forth the general intent and purpose of the act, in a succinct way:

(a) Definitions.—For purposes of this section—

(1) the term "consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

(2) the term "ordinary course of business" means only debt collection activities, order fulfillment, request processing, and the transfer of ownership;

(3) the term "personally identifiable information" includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and

(4) the term "video tape service provider" means any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

(b)Video Tape Rental and Sale Records.—

(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).

(2) A video tape service provider may disclose personally identifiable information concerning any consumer—

(A) to the consumer;

(B) to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer that—

(i) is in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer;

(ii) at the election of the consumer—

(I) is given at the time the disclosure is sought; or

(II) is given in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner; and

(iii) the video tape service provider has provided an opportunity, in a clear and conspicuous manner, for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election;

(C) to a law enforcement agency pursuant to a warrant issued under the Federal Rules of Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order;

(D) to any person if the disclosure is solely of the names and addresses of consumers and if—

(i) the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and

(ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer;

(E) to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or

(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if—

(i) the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and

(ii) the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

(3) Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry. In the case of a State government authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the video tape service provider, may quash or modify such order if the information or records requested are unreasonably voluminous in nature or if compliance with such order otherwise would cause an unreasonable burden on such provider.

(c) Civil Action.—

(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

(2) The court may award—

(A) actual damages but not less than liquidated damages in an amount of $2,500;

(B) punitive damages;

(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(D) such other preliminary and equitable relief as the court determines to be appropriate.

(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

(4) No liability shall result from lawful disclosure permitted by this section.

(d) Personally Identifiable Information.—

Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

(e) Destruction of Old Records.—

A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (b)(2) or (c)(2) or pursuant to a court order.

(f) Preemption.—

The provisions of this section preempt only the provisions of State or local law that require disclosure prohibited by this section.

At least one district court has concluded that all the sections of the act must be read in lock-step: there is liability under (b)(1) for knowing disclosures provided there is no applicable exception under (b)(2). Knowing violations under (b)(1) and (b)(2) read together are the only grounds supported a cause of action under (c). Evidence is only excludable under (d) if the way it was leaked gave rise to damages under (c). In other words, as an individual, if your private data is released accidentally or negligently by a Service Provider, you are "SOOL." Not only can you not sue anyone for damages, actual or statutory, but your private information is completely unprotected in court. Then your spouse can introduce evidence of what movies you watched into custody hearings, anyone can publish and sell your private data, the government can use this information against you criminally, etc.

While this line of analysis is certaining tempting because it makes reading and applying the statute relatively straightforward, and it cuts the knees out from a lot of strange and dumb lawsuits seeking damages under (c), and why would Congress make things more complicated than they need to be or a statute so tricky to read and understand…, but when it comes down to it, this line of thinking makes no sense as a policy matter, and it certainly conflicts will the Congressional testimony. And it does violence to the plain language of the Act, which does use language in (d) so completely different than (b) on its face. It is a fundamental principle of interpretation that statutory words should be read to have meaning; that identical statutory language should if possible be read to mean the same thing; and that different statutory language should if possible be read to mean different things.

Senator Daniel Patrick Leahy, chief sponsor of the bill, Chairman of the Senate Committee and the Joint Committee, and its legislative shepard, described (d) as the the catch-all part of the Bill, intended to protect individuals from having their Private Video

Information used against them in court, no matter how it gets out there (unless it is proper to do so). That certainly would explain its completely different language.

Congressional testimony named and distinct, albeit complementary, privacy concerns undergirding the specific provisions of this Act, some taken directly from Constitutional interpretation, including:

- The right to be left alone.
- The right of individuals to feel safe, secure, and private when viewing videos.
- Individual freedom to explore...ideas and everything else...without a chilling effect from the fear of exposure whenever one watches a video or movie.
- Protecting individuals from a "cradle-to-grave society" where what they do all of their lives becomes a profile that they cannot escape and sets a destiny they cannot avoid.
- Preventing corporations from gradually gaining, over individuals, the kinds of oppressive powers that are explicitly prohibited government under the First and Fourth Amendments.
- Contributing to the establishment of two interlocking, mirrored webs of privacy rights protecting individuals from both private corporations and the government
- Protecting people from the exposure of the most intimate matters and details of their lives, such as personal sexual identity, because it is revealed that they watched or purchased movies with "gay themes."
- Protecting people from having false identities attributed to them by others, such as personal sexuality, because it is revealed that they they watched or purchased movies with "gay themes."

- Not discouraging the best people from becoming judges and other public servants, for fear that the intimate private details of the movies and videos they watched will be exposed, as in the case of Judge Bork.
- The outrageous specter of Personal Video Information being used in court against anyone in court, for any purpose, except a very darn good reason, but most of all in matters of great import, such as child custody determinations.

It is fair to say that the last of these, exploitation of Personal Video Information against individuals, especially in important civil matters, was something that especially riled up several Congressmen, producing great statements of indignation.

Additional Legislative History

The House Chairman of the Joint Committee opened the proceedings by explaining, from his prepared remarks:

BEGINNING IN 1970 WITH THE PASSAGE OF THE FAIR CREDIT REPORTING ACT, AND ENDING LAST CONGRESS WITH THE ELECTRONIC COMMUNICATIONS PRIVACY ACT, THE CONGRESS HAS SHOWN ITS CONCERN OVER THE EXPANDING COMPUTERIZATION OF OUR SOCIETY, AND OVER THE PROTECTION OF EACH AND EVERY INDIVIDUAL'S "RIGHT TO BE LET ALONE." JUSTICE BRANDEIS'S FAMOUS WORDS CONTINUE TO RING TRUE, AND THEY ARE THE PREMISE OF THE LEGISLATION WE CONSIDER TODAY.

. . . . .

NOW WE ARE STARTING TO HEAR ABOUT SIMILAR INTRUSIONS INTO THE PRIVACY OF VIDEO USERS. JUDGE BORK'S EXPERIENCE MAY BE THE MOST PROMINENT, BUT THERE ARE ALSO REPORTS THAT VIDEO RECORDS ARE BEING SOUGHT IN DIVORCE CASES, IN CHILD CUSTODY DISPUTES, AND IN CRIMINAL PROCEEDINGS.

. . . . .

PEOPLE MUST NOT BE DETERRED ... BY FEARS OF GOVERNMENTAL OR PRIVATE "SNOOPS." THESE PRINCIPLES APPLY AS MUCH TO CUSTOMERS OF VIDEO STORES AS TO PATRONS OF LIBRARIES.

. . . . .

UNLESS THE CONGRESS PROVIDES FOR A STRONG NATIONAL STANDARD, THESE ABUSES WILL CONTINUE TO BE UNREGULATED. WE MUST NOT ALLOW THAT TO HAPPEN. I AM PLEASED THAT BOTH HOUSES OF CONGRESS ARE MOVING JOINTLY AND IN A BIPARTISAN MANNER TOWARD PASSAGE OF THIS LEGISLATION. WE EXPECT TO MOVE IT EXPEDITIOUSLY, AND WE EXPECT THAT IT WILL BECOME LAW BY THE END OF THE 100TH CONGRESS. SOME MAY SAY THAT THE INCREASING INVASION OF OUR CITIZENS' PRIVACY MAY BE UNSTOPPABLE AND INEVITABLE, BUT SO WILL BE THE EFFORTS OF THIS SUBCOMMITTEE, AND I BELIEVE THE CONGRESS AS A WHOLE, TO CURB THAT INVASION.

Congressman McCandless from California wrote the first draft of the bill. He put it this way before the Joint Committee:

> At the heart of this legislation is the notion that all citizens have a right to privacy-the right to be left alone-from their Government and from their neighbor.
>
> A glance at the list of Members of Congress sponsoring this legislation indicates that this notion transcends party lines and political philosophy.
>
> There's a gut feeling that people ought to be able to read books and watch films without the whole world knowing. Books and films are the intellectual vitamins that fuel the growth of individual thought. The whole process of intellectual growth is one of privacy-of quiet, and reflection. This intimate process should be protected from the disruptive intrusion of a roving public eye.
>
> What we're trying to protect with this legislation are usage records of content-based materials-books, records, videos, and the like.
>
> Under our Constitution, content-based materials receive special protection. Only in the most extreme circumstances can the Government prohibit their distribution. Yet to the extent that receivers of the information are threatened with a loss of anonymity, the Constitutional right to distribute materials is licensed [sic, probably "limited". The legislation you are considering, therefore, compliments [sic] the First Amendment.
>
> Finally, there is an element of common decency in this legislation. It is really nobody else's business what people read, watch, or listen to.
>
> We all felt a sense of outrage when Judge Bork's video list was revealed in print. His privacy was invaded. But what the incident also demonstrated was the tremendous storage and retrieval capabilities of even the smallest of today's businesses.
>
> Currently, only a chain-link fence protects the privacy of consumers of content-based materials. That chain-link fence is the policy and discretion of an individual merchant or librarian. **I ask the committees to build a brick wall--a Federal privacy right--around the individual: Pass H.R. 4947 and S. 2361.**

Statements before a legislative committee, particularly with regard to a pending piece of legislation with widespread (overwhelming) public support, of course must always be read in part as political performance theater, and in part genuine comment on the Bill. Still, it is hard to read to read any portion of the Legislative History without coming to the conclusion that Congress saw the Act as very important, and intended it to be very powerful and wide-ranging.

Differences in Statutory Language from Section to Section and Subsection to Subsection of the Act Mirror Policy and Legislative Concerns Raised by Congressman

Quite obviously, with a seat at table--publicly backing the proposed legislation with unanimity--the Video Tape Industry would have been privately concerned to place limitations on the potential for damages. The damage and relief provisions of the Act are quite broad because they provide for actual damages, liquidated damages, attorney's fees, and equitable relief--still there are so many obvious reasons for Congress to limit damages to knowing disclosures, and only with respect to disclosures by Video Service Providers of Video Privacy Information for its own customers. Limitations on damage provisions reflect a natural comprise, as well as a legitimate concern not to potentially destroy small businesses (which most video rental stores then were) over accidental mistakes.

Senator Leahy described the liability provisions of the Act as imposing "something like a negligence standard" for industry. A knowing standard is not a negligence standard. But to the point, it is impossible to describe this statement by the Senator to mean anything else but that the liability rules of sections (b)(1) and (c) were intended to be considerably narrower than the privacy protections afforded to Consumers.

This in turn supports reading the plain language of the act, with respect to the scope and meaning of Consumer in different sections. While liability under section (b)(1) extends liability only to "any customer of such provider," section (b)(2) nonetheless prohibits Video Service Providers from disclosing "personally identifiable information concerning any consumer."

Applicability of the Video Privacy Act to Malibu Media

Let us establish, Malibu Media is a "video [tape] service provider" covered by the restrictions of the Video Privacy Protection Act of 1988, as amended,, because it is "engaged in the business, in or affecting interstate commerce…, of rental, sale, or delivery of prerecorded cassette or similar audio visual materials."

What are "prerecorded cassette or similar audio visual materials" (hereinafter "Videos"), and do these include digital movies that Defendant streams and digital movie files that he downs? Courts have answered this clearly in the affirmative.

In a very prominent case involving Hulu, the Northern District of California ruled that Hulu's streaming videos are "similar audio visual materials to pre-recorded cassette tapes. *In re Hulu Privacy Litigation*, No. C 11–03764 LB, 2012 WL 3282960, slip op. (N.D. Cal.) It is worth noting too that both Netflix and Google have accepted without dispute the applicability of the Act to their online streaming videos. In fact, Congress implicitly accepted this interpretation of the Act when it amended the Act in 2013, essentially at the request of Netflix.

The First Circuit recently treated treated "news and entertainment media content, including [digital] videos" accessed through a cell phone application as audio visual materials protected by the act. *Yershov v. Gannett Satellite Information Network, Inc.*, No. 15-1719 (1st Cir. Apr. 29, 2016) at 1. Only future case law will define the full limit of digital "audio visual materials" to which the Act applies.

Malibu Media has paid subscribers, who are able to stream from X-Art's catalog through it's website over a browser, and are also able to download copies of its featurettes for their personal viewing at their leisure. Paid subscribers constitute (but are potentially not the only applicable) Consumers for purposes of section (a)(1) of the Act.

Since Malibu Media has customers and provides Videos in internet state commerce, it is a regulated entity, known under the Act as a "video tape service provider" ("Service Provider").

Effect of the Act's Applicability

Under section (b)(2) of the Act, Service Providers such as Malibu Media may not disclose "p*ersonally identifiable information,"* referenced more helpfully in this memorandum as "Private Video Information," except for a specific exception enumerated and defined in the Act.

There are six permissible exceptions, five of which appear to be external, based upon the needs of others, and only one exception related to a Service Provider's own business or economic reasons.

This one "internal" business exception is highly limited. The original version of the bill introduced into Committee (in this case it was a Joint committee of the Senate and House) contained a general, broad exception "for the reasonable business interests" of the Service Provider. Cite Reasonable business interests of a Service Provider would surely include the decision to defend and enforce its copyrights.

But this provision was eviscerated in Committee, according to Chairman Leahy, out of concern (almost certainly correct) that, while this was actually intended by Congress to be a very limited exception, Service Providers would use it over time to render the provisions of the Act essentially meaningless as applicable to their own voluntary decisions to release protected Personally Identifiable Information. Cite

The paltry exception that survived for Service Providers (hereinafter "Business-Related Disclosure Exception") permits release of Consumer Private Video Information only for "debt collection activities, order fulfillment, request processing, and the transfer of ownership." Left uncovered are any and all other reasonable business objectives, including copyright enforcement.

Application of Section (d) of the Act

Accordingly, section (b)(2) of the Act makes it improper for Plaintiff to make, expose, or disclose the claims that it does regarding Defendant's possible consumption of copies of its movie.

Section (d) of the Act deals the deathblow to Malibu Media. Under the plain language of section (d), no matter who obtains Private Video Information, of how they obtain it, they can't introduce it in Court--and therefore use it as the factual basis for its Complaint.

Ultimate Failure to Failure to Allege Facts Sufficient to Support a Cause of Action

Stripped of Plaintiff's inadmissible claims regarding Defendant's Private Video Information, pursuant to section (d) of the Video Privacy Protection Act, there are no factual allegations whatsoever in the Complaint to support it. It must be dismissed.

Defendant might stop there, but he feels compelled to point out that even if Plaintiff's allegations regarding Defendant were not estopped by the Privacy Act, even then they are insufficient.

The specific factual claims Plaintiff makes are all incredibly "small" or else completely "speculative." This is true on their face; however, as explained more fully below, the better understands the operation of utorrent and other BitTorrent client services, the smaller and smaller and conjectural and conjectural Plaintiff's claims become.

To put it more directly, the fact that Plaintiff's investigative firm uploaded at least one bit of a movie using proprietary software through the BitTorrent protocol establishes nothing except that this one bit of a movie was uploadable by its investigative firm at the exact moment it was uploaded by the exact propriety means that Plaintiff uploaded it. It shows nothing else.

The implication seems to be that each of these movies must have been, or probably was in point of fact, downloaded in full, permanently stored, viewed in violation of copyright law, made available to others for uploading, and/or used for uploading by many persons. In fact, it is impossible to turn off uploading directly while a video is streaming or downloading, but many users more than accomplish this in all practical effect by manually setting the upload volume extremely low, restricting the number of possible uploaders from many to one, restricting the number of connections that any uploader can make from many to one; by keeping utorrent disconnected from the internet except when it is being used for a specific purpose; and finally very commonly, turning off a torrent when it is found to be completed downloading (preventing any possible further uploading) or if seems to get stuck unable to finish. Nothing in Plaintiff's Complaint is inconsistent with these common practices to prevent uploading. In fact, the availability of torrents and the download times for them vary from torrent to torrent and time to time. It is very possible for file downloads to start but be unable to finish or to give up because they are too slow.

Likewise, the fact that Plaintiff's investigator was able to compete uploading a movie over the Bittorrent network, probably using proprietary technology, operating around the clock, with ability to connect to a huge number of other computers, all around the world, and with ultra-fast up-speed capability, says nothing about whether anyone else was practically able to download or upload a full copy of the movie using a mass market program service, a small number connections, slow download and upload speeds, limited temporary memory, brief connections to the BitTorrent network, etc.

Likewise, utorrent in its premium version can and generally is used to live stream, and in its other versions it also streams, with a time delay. Competing services are similar. In the case of streaming, live or delayed, pieces of a file are or may be put into temporary computer memory (buffered for viewing), but never be transferred into permanent memory, which is a slower process. This is just the tip of the iceberg. None of this is to dispute Plaintiff's claims, or assert factual claims that are not public knowledge for purposes of 12(b)(6) motion, but simply to help explain how meager and speculative the factual claims of the Plaintiff really are.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this 23rd day of May, 2016, a true and correct copy of the foregoing was mailed to counsel of record for Plaintiff via regular mail, certified receipt. An electronic copy was also sent to him thereafter.

Jeffrey Claburn